United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-1283

To be argued by
EUGENE F. BANNIGAN

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,
Appellant,

against

SECURITY NATIONAL BANK,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR DEFENDANT-APPELLEE

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Preliminary Statement

The United States of America appeals from a jury verdict of acquittal entered as to Security National Bank in the United States District Court for the Eastern District of New York on May 13, 1976, following a ten and one-half week joint trial before the Honorable Mark A. Costantino, United States District Judge, and a jury.

Indictment 75 Cr. 654 was filed in 21 counts on September 5, 1975. Count one charged Patrick J. Clifford, David

J. Dowd and Frank B. Powell with a conspiracy to cause Security National Bank to make political contributions, in violation of Title 18, United States Code, Sections 371 and 610. Counts Two, Four, Six, Eight, Ten, Twelve, Fourteen, Sixteen and Eighteen charged Security National Bank with making political contributions, in violation of Title 18, United States Code, Section 610. Counts Three, Five, Seven, Nine, Eleven, Thirteen, Fifteen, Seventeen and Nineteen charged various of the individual defendants with having caused Security National Bank to make the contributions charged in the even numbered counts—Counts Two through Eighteen—in violation of Title 18, United States Code, Sections 610 and 2.* Count Nineteen charged Patrick J. Clifford, David J. Dowd and Frank B. Powell with conspiracy to misapply bank funds in violation of Title 18, United States Code, Sections 371 and 656. Counts Twenty and Twenty-One charged Patrick J. Clifford with making false statements in a matter within the jurisdiction of the United States, in violation of Title 18, United States Code, Section 1001.

The trial commenced on March 3, 1976, and ended on May 13, 1976, when the jury returned not guilty verdicts as to all the defendants on Counts One through Twelve and a guilty verdict as to the defendant Patrick J. Clifford on Count Thirteen.

The United States filed its Notice of Appeal on June 7, 1976.

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* Prior to impaneling the jury, and with the consent of the Government, the even and odd numbered substantive §610 counts were consolidated and renumbered Counts Two through Ten.

Statement of Facts

A. Introduction

At the trial, the Government unsuccessfully sought to prove that during the years 1972 through 1974 the Security National Bank (the "Bank") and three of its former officers violated Title 18, United States Code, Section 610 by making illegal political contributions. The Government's theory of the case was that the Bank made indirect contributions by raising the salaries of certain of its officers and then directing the officers to pay back a portion of the salary increases to a fund from which the contributions were made. The individual defendants defended against these charges on the ground that they acted in good faith reliance on Bank counsel's advice that the program was legal. The Bank defended on the ground that the officers were not merely conduits for the Bank, but were free to use their salary increases as they saw fit without fear of reprisal. By its acquittal, the jury quite clearly and properly accepted the contentions of the defendants.*

B. The Government's Case

In its direct case, the Government called twenty-eight witnesses, twenty-three of them former officers of the Bank. These former officers testified concerning their participation in a program whereby Bank personnel were asked to make contributions to various political organizations, primarily local political committees in Nassau and Suffolk

* While the Government's statement of the facts (GB at 1-16) at times reads as though the Government had prevailed in the trial below, this was clearly not the case. Accordingly, the general rule that the Government (as *appellee*) is entitled to have the facts viewed in the light most favorable to it, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Freeman*, 498 F.2d 569 (2d Cir. 1974); *United States* v. *McCarthy*, 473 F.2d 300 (2d Cir. 1972), is inapplicable here.

counties where the Bank conducted the bulk of its business (E.g. Tr. 454-458, 513-516, 525, 761-763, 828-830, 1161-1162; A. 68-72, 127-130, 139, 297-299, 341-343, 612-613).* During the period covered by the indictment, the Bank was constantly swamped with solicitations for such contributions (Tr. 747-748, 1797-1798; A. 1090-1091). In almost every instance, the solicitations requested that the Bank purchase tickets to local political dinners, outings and clambakes and purchase advertising space in journals printed for such gatherings (Tr. 1797-1798; A. 1090-1091). By having its officers attend these functions, and by advertising through the journals, the Bank hoped to maintain and enhance its visibility and competitive position in its business region (Tr. 1136-1137, 1204, 1799; A. 601-602, 655, 1092), and particularly its ability to attract municipal accounts (Tr. 454, 498-499; A. 68, 112-113).

The officers' contributions program, which began in late 1967, had its origins in an earlier program maintained by the Bank's Board of Directors (Tr. 829; A. 342). Beginning in 1966 (Tr. 2120-2121; A. 1361-1362), each Director voluntarily contributed $50.00 of the $100.00 monthly fee he received for attendance at Board meetings to a pool which was utilized to purchase dinner tickets and the like and advertising space in political journals (Tr. 2210, 2226-2227). Subsequently, the Directors' attendance fee was increased to $200.00 per month, of which $50.00 or perhaps $100.00 continued to be contributed for these purposes (Tr. 2271). By late 1967 or early 1968, however, the Directors complained that these contributions were a financial drain

* References prefixed "A." refer to Appellant's Appendix; references prefixed "BA" refer to the Bank's Appendix; references prefixed "Tr." refer to the trial transcript; references prefixed "GX" and "DX", respectively, refer to the Government and Defense Exhibits received in evidence; and references prefixed "GB" refer to the Government's Brief on this appeal.

on their resources, and, accordingly, the Directors' program was curtailed (Tr. 2121-2122, 2218-2256, 2264-2273; A. 1362-1363).

In late 1967, approximately fifteen officers were asked by senior personnel of the Bank to become participants in an officers' contributions program (E.g. Tr. 454-458, 513-516, 643-645, 761-762, 828-830, 903-904; A. 68-72, 127-130, 241-243, 297-298, 341-343, 417-418). These officers were selected because they were considered to be key personnel of the Bank (Tr. 455-456, 829-830; A. 69-70, 342-343). Each officer was told that if he agreed to participate, he would be asked to contribute $100.00 per month to the contributions fund (E.g. Tr. 456, 645, 904-905, 1127; A. 70, 243, 419-420, 592). Each officer was also informed that if he agreed to participate, he would receive an annual salary increase of $1,700 (E.g. Tr. 456, 645, 763, 904, 977, 1162; A. 70, 243, 299, 419, 441, 613). The figure of $1,700 was computed as approximating the projected contributions of $1,200 per year plus the taxes payable thereon (Tr. 456, 645, 763, 977; A. 70, 243, 441). When approached about joining the contributions program, several officers asked if it was legal, and they were told that it had been approved by the Bank's counsel (E.g. Tr. 764, 905, 978, 1163; A. 300, 420, 442, 614).

Every officer approached in late 1967 and early 1968 agreed to participate in the contributions program, and each officer received a $1,700 salary increase which was noted on his payroll record (E.g. Tr. 767-768. 906-907, 926, 932, 981-982, 1164; A. 303-304, 421-422, 445-446, 615). These $1,700 salary increases were never, however, brought to the attention of the Board of Directors of the Bank, which had the

exclusive authority to grant salary increases (Tr. 2088-2109, 4854-4855; A. 1331-1351; BA 106-107).

To carry out the contributions program begun in October, 1967, a special account was established in the name of Betty Jaeger (Tr. 698-702). From late 1967 until May, 1970, the participating officers delivered or sent their contributions to Mrs. Jaeger, generally by check (Tr. 716, 754). Mrs. Jaeger in turn wrote checks on the special account, drawn to organizations or committees approved by Mr. Dowd (Tr. 748-749). During the period between late 1967 and May, 1970, additional officers were brought into the program, bringing the total to approximately 25 (Tr. 715-716), all but two of whom* were granted $1,700 annual salary increases in connection with their agreement to become participants.

In May, 1970, the Betty Jaeger special account was terminated and a new checking account, denominated the "Long Island Public Affairs Club," was substituted to handle the officers' contributions (Tr. 720). Thomas Casey testified that Joseph Dutra had told him that the Betty Jaeger system was terminated because "it was not deemed well appearing because it was a commingled fund" and that a "cosmetic change was needed" (Tr. 1295-1296; A. 663-664). According to Casey, Dutra had urged the creation of a public affairs club to make the contributions (Tr. 1296; A. 664). From May, 1970, until September, 1970, the officers continued to deliver their contributions, generally by check, to Mrs. Jaeger, who deposited them in the Long Island Public Affairs Club account and drew checks on the

* Patrick Clifford (Tr. 3306; A. 1661) and Joseph Dutra (Tr. 4460-4461; A. 2663-2664) did not receive salary increases.

account to donees designated by Mr. Dowd (Tr. 725-727, 731-732).

In September, 1970, the Long Island Public Affairs Club account was terminated (Tr. 731-732). Casey testified that, according to Dutra, the Club suffered from the same disabilities as the Jaeger account, i.e. it was a commingled fund (Tr. 1306; A. 674). Casey testified that "the question was how could the contributions be made so that they would appear to be made on behalf of individuals" (Tr. 1320; A. 689). After September, 1970, the contributions program was coordinated by Mr. Arthur Chadwick, whose function it was to contact the participating officers and request them to draw checks on their personal checking accounts to donees designated by Mr. Chadwick (Tr. 1736-1737, 1740-1742; A. 1029-1030, 1033-1035), who acted under the instructions of Mr. Dowd or Mr. Dutra (Tr. 1741; A. 1034). Mr. Chadwick would collect the checks and deliver them to the recipients (Tr. 1742; A. 1035).

The "Chadwick system" continued until approximately April, 1974, by which time additional officers were participating (E.g. Tr. 1654-1656, 1880-1882, 1911-1913, 1984-1985; A. 1000-1002, 1155-1157, 1186-1188, 1260-1262). Several of these officers received salary increases in connection with their agreement to participate in the contributions program (E.g. Tr. 1656, 1880, 1912, 1984-1985; A. 1002, 1155, 1187, 1260-1262). All the substantive counts in which the Bank was charged related to contributions made in the period of time when the Chadwick system was in effect.*

* In its Brief (at 7), the Government persists, as it did at trial (Tr. 2371-2393, 2441; GX 181; BA 17-41), in inflating the total amount of contributions made. As the Government conceded at trial (Tr. 2380; BA 27), the seven-year total was closer to $200,000 than the $300,000 which appears in the Government's Brief.

1. Characterization of the funds contributed

The Government's position throughout the trial was that the contributions made by the officers amounted to indirect contributions by the Bank (Tr. 374, 4936-4946; BA 189-199). A number of officers who testified for the Government, however, indicated that they had in various ways treated the raises as their own property. Several officers testified that they only made contributions to candidates or committees of their own liking (Tr. 860, 1117, 1612-1613; A. 373, 582, 958-959). Several testified that for various personal reasons they ceased making contributions and treated the $1,700 salary increase as their own, spending it as they pleased (Tr. 1673-1674, 1972-1973; A. 1019-1020, 1248-1249). Indeed, the Government's star witness, Thomas Casey, testified that he contributed only $720 over a period of more than two years, whereas he had received a $2,000 annual salary increase in connection with his agreement to make contributions (Tr. 1443-1444; A. 798-799). None of the officers who stopped contributing was ever penalized in any way. Regardless of when any officer stopped contributing, he continued to receive the salary increase (Tr. 1972-1973; A. 1248-1249). In addition, pension, profit sharing and life insurance programs were keyed to every officer's gross salary, including the raise received in connection with the contributions program (Tr. 457-458, 646-647, 1179-1182; A. 71-72, 244-245, 630-633).

2. Voluntariness of the officers' participation

The Government contended at the trial and elicited some testimony that officers who agreed to participate in the contributions program "had no real choice" in the matter (Tr. 900, 1655, 1882, 1913-1914, 4859-4860; A. 414, 1001, 1157, 1188-1189). Yet, a number of the other officers who testi-

fied on behalf of the Government stated that their participation was entirely voluntary (Tr. 480, 1119-1120, 1134-1135, 1970; A. 94, 584-585, 599-600, 1246). Indeed, there was no evidence that coercion, physical threats, job discrimination or financial reprisals were utilized to compel officers to participate as contributors (E.g. Tr. 1120; A. 585). Moreover, there was evidence that officers who declined to participate continued to receive promotions by the Bank (E.g. Tr. 1971-1972; A. 1247-1248).*

C. The Defense Case

The Bank did not call a single witness on its behalf.** The Bank's defense, based upon the testimony of Government witnesses and witnesses called by the individual defendants, was that when the salary increases were given to the officers, the money became theirs absolutely and its use in making political contributions did not amount to indirect contributions by the Bank within the meaning of 18 U.S.C. §610 (Tr. 5238; A. 2771).

Trial counsel for the Bank argued that the character of the raises as the officers' funds rather than the Bank's money was indicated by several factors. First, several officers stopped making contributions and used the money for

* The Government offered evidence on the issue of wilfulness to establish that the individual defendants knew that the contributions program was illegal. This evidence was rebutted on the defense case. While the Government makes certain oblique references to this evidence in its Brief (GB at 14-15), we refrain from following a similar course since the issue of wilfulness is not relevant in an appeal involving only the Bank.

** The Bank's motion to qualify a witness as an expert and permit him to testify concerning characterization of the funds contributed was, at the urging of the Government, denied by the trial judge (Tr. 4436-4447; BA 91-102). *See*, "Memorandum of Security National Bank in Support of Its Motion to Qualify Mr. William T. Holloran as an Expert Witness" (BA 271-278).

their own purposes (Tr. 1673-1674, 1972-1973, 5239-5243; A. 1019-1020, 1248-1249, 2772-2776). Second, several officers testified that they considered the money to be their own (Tr. 2573, 3191, 3241, 3656, 5243-5246; A. 1454, 1562, 1605, 1991, 2776-2779). Third, several officers contributed only to political organizations which were politically acceptable to them (Tr. 860, 1117, 1612-1613, 5241-5242; A. 373, 582, 958-959, 2774-2775). Fourth, one officer testified that in filing his tax returns, he deducted the contributions from his gross income to the extent legally permitted (Tr. 4198). Moreover, trial counsel for the Bank argued, the contributions program was entirely voluntary in nature (Tr. 480, 1119-1120, 1134-1135, 1970, 2569-2570, 3127-3128, 3190, 3209, 3250, 3648, 5251-5252; A. 94, 584-585, 599-600, 1246, 1450-1451, 1497-1498, 1561, 1578, 1614, 1983, 2784-2785), no individual was forced to contribute, and no person who refused to participate was ever penalized in any way (Tr. 1971-1972, 3211-3212, 5252-5253; A. 1247-1248, 1580-1581, 2785-2786). Finally, the Bank requested and the Court charged the jury that it could not find the Bank guilty if it concluded that the officers responsible for the contributions program were acting outside the scope of their authority (Tr. 5345-5347; A. 2838-2840; BA 354).*

The core of the individuals' defense was their asserted good faith reliance on the advice of counsel in initiating and continuing the contributions program (E.g. Tr. 5049-

* Counsel for the Bank did not argue this theory of an acquittal in either his opening or closing remarks, but testimony was adduced at trial which would have supported an acquittal on this basis (*see, e.g.*, Tr. 2088-2109; A. 1331-1351). Indeed, there was no reason for the Bank's counsel to argue this since the Government itself argued that only the Bank's Board of Directors had authority to grant salary raises, and the Board had never approved or authorized the raises given to the officers (Tr. 4854-4855; BA 106-107).

5062, 5141-5162, 5204-5218). To establish this defense, all three defendants testified, and, in addition, they called ten substantive witnesses and fifteen character witnesses.

1. Testimony of David Dowd

David Dowd testified that in the fall of 1967 he had a conversation with Patrick Clifford in which Clifford told him that certain of the Directors did not want to continue the Directors' contributions program because they felt that they were not being paid enough (Tr. 3689; A. 2017). Clifford asked Dowd to investigate how other banks raised money for their officers to attend political dinners (Tr. 3689; A. 2017). Dowd called certain banks and determined that the most prevalent method was that senior officers were paid sufficient salaries so that they could purchase tickets out of their own pockets (Tr. 3694-3694a; A. 2022-2023). Dowd related this information to Clifford, who had by now decided to end the Directors' contributions program (Tr. 3697; A. 2026). Clifford told Dowd that he had discussed the question with William Shea, the Bank's counsel, who had informed Clifford that he had asked his partner, George DeGenaro, to look into the question (Tr. 3697; A. 2026).

Dowd subsequently spoke with DeGenaro after DeGenaro had completed his research. Dowd testified that DeGenaro advised him that (1) the Bank could not make political contributions; (2) the individual officers could buy tickets with their own funds, provided it was voluntary; (3) the Bank could not reimburse the officers for their contributions; and (4) the Bank could increase the officers' salaries to enable them to afford to make the contributions, provided the money became their own property (Tr. 3700-

3701; A. 2029-2030). Dowd reported this advice to Clifford and Herman Maass, then Chairman of the Board (Tr. 3703-3704; A. 2032-2033).

Dowd testified that he and Mr. Maass, along with Mr. Powell, Mr. McCabe and Mr. Honan, then selected a group of approximately fifteen officers who would be invited to make contributions. Officers were chosen on the basis of their dedication to the best interests of the Bank (Tr. 3705-3708; A. 2034-2037). It was also agreed at the meeting between Messrs. Dowd, Maass, Powell, McCabe and Honan that if an officer agreed to participate, his salary would be increased $1,700 per year (Tr. 3711-3712; A. 2040-2041).

Following this meeting, Dowd testified, he again called DeGenaro and outlined the proposed program, specifically mentioning that the participating officers would be given $1,700 annual salary increases (Tr. 3712; A. 2041). DeGenaro confirmed that the proposed program would be legal, and stressed the requirements that the participation be voluntary and the money become the property of the officers (Tr. 3712-3715; A. 2041-2044).* Following this conversation with DeGenaro, Dowd reported DeGenaro's advice to Clifford in the presence of Roger Lew,** an officer of

* On the voluntariness question, for example, he stated that the most senior officers, such as Mr. Clifford and Mr. Maass, should not approach the officers. On the requirement that the money become the property of the officers, DeGenaro suggested that the raise be automatically credited to the officer's account, but that the contribution not be automatically deducted. He emphasized that no reprisals could be taken against an officer who failed to contribute. This advice was followed in all respects (Tr. 3712-3717; A. 2041-2046).

** Roger Lew, one of the officers who testified for the defense, stated that he was in Clifford's office in late 1967 when Dowd related DeGenaro's advice on the format of the program to Clifford (Tr. 3125-3127; A. 1495-1497). He testified that Dowd related that

(footnote continued on next page)

the Bank (Tr. 3719, 3125-3127; A. 2048, 1495-1497). Dowd and Powell subsequently recruited the initial group of officers into the club (Tr. 3720-3722; A. 2049-2051).

In early 1970, Dowd testified, Joseph Dutra suggested to Dowd that the Betty Jaeger system, then in effect, be terminated and a new organization, one in the nature of a club with elected officers, be substituted as a vehicle for the contributions program (Tr. 3805-3806; A. 2137-2138). This proposal was approved by the management committee of the Bank and by Mr. DeGenaro, who stated that the club format would be legal if the earlier guidelines were followed (Tr. 3806-3809; A. 2138-2141), and suggested that Mr. Driscoll, the Bank's in-house counsel, draw up the necessary papers to form the club (Tr. 3810; A. 2142). Dowd testified that he related DeGenaro's approval to Dutra, who subsequently sent Mr. Driscoll a memorandum stating that "with the concurrence of the bank's counsel, and agreement of members of senior management, I would like to form the Long Island Public Affairs Club. . . . Could you find me a simple set of by-laws which I can use to formalize this club structure" (Tr. 3810-3813; A. 2142, 2145; DX PPP). The Long Island Public Affairs Club was thereupon instituted in May, 1970.*

DeGenaro had approved the granting of salary increases (Tr. 3126; A. 1496).

Another officer, Stephen Corriss, testified that in 1971 he was present at a lunch or dinner table at which the topic of conversation was political contributions (Tr. 2571; A. 1452). He testified that either George DeGenaro or Thomas Hagen (one of DeGenaro's partners) was present at the table and that, whichever attorney it was, he stated that in his opinion the Bank's contributions program was legal (Tr. 2572; A. 1453).

* A notice proclaiming the formation of the Long Island Public Affairs Club was posted on the Bank's bulletin board and sent to every officer (Tr. 4172-4175; A. 2493-2496; GX 188).

Dowd testified that the demise of the Long Island Public Affairs Club in September, 1970, came about indirectly as the result of a *Wall Street Journal* article dealing with an IRS investigation of illegal political contributions (Tr. 3816; A. 2148; GX 162). The article prompted phone calls between Powell and DeGenaro, and Dowd and DeGenaro in July, 1970 (Tr. 3816-3817; A. 2148-2149). Dowd again explained to DeGenaro how the contributions program worked. DeGenaro replied that he had discussed it with the members of his firm and that, although there was nothing illegal about the club format, he felt that it might be misconstrued. From the standpoint of assuring voluntariness, DeGenaro stated that it would be preferable to have the officers write their own checks on their own accounts whenever contributions were requested (Tr. 3817-3818; A. 2149-2150). As a result of this advice, the Chadwick system was instituted in September, 1970 (Tr. 3826; A. 2158).

The Chadwick system, which continued until 1974, received Mr. DeGenaro's approval on yet another occasion. Dowd testified that in February, 1972, following the amendments to 18 U.S.C. §610, permitting banks and corporations to set up separate, centralized funds for political contributions by their employees, he sent a memo to DeGenaro suggesting such a system at the Bank and subsequently asked DeGenaro whether, in his view, such a fund—along the lines of the earlier Betty Jaeger and Long Island Public Affairs Club accounts—could be reinstituted. DeGenaro insisted that, in spite of the change in the law, it was his view that the system of individualized contributions was preferable. The Bank followed this advice, although it meant a great deal more administrative work (Tr. 3841-3847; A. 2179-2176).

2. *Testimony of Patrick Clifford*

Patrick Clifford testified that shortly after the termination of the Directors' contributions program, he discussed with David Dowd the formation of an officers' contributions program (Tr. 3291-3295; A. 1646-1650). Clifford informed Dowd that he would speak to William Shea, the Bank's counsel, about the legal aspects of setting up a contributions program involving the officers (Tr. 3295; A. 1650). Clifford called Shea and requested that Shea assign a lawyer from his firm to research the law on the subject (Tr. 3296; A. 1651). Shortly thereafter, Shea informed Clifford that George DeGenaro would be handling the matter, and Clifford in turn told Dowd to consult with DeGenaro (Tr. 3296-3297; A. 1651-1652). Clifford's testimony concerning Dowd's version of DeGenaro's advice (Tr. 3299-3300; A. 1654-1655) was substantially the same as Dowd's testimony on the subject (Tr. 3699-3701; A. 2028-2030). Following approval by Mr. Maass, Clifford testified, the program was put into operation under the supervision of Mr. Powell (Tr. 3300-3302; A. 1655-1657). Clifford stated that he at all times believed the program in effect from late 1967 until 1974 was legal and had been approved by counsel (Tr. 3318; A. 1673).

3. *Testimony of Frank Powell*

Defendant Powell testified that in October, 1967, Dowd discussed with him a proposal to establish an officers' contributions program (Tr. 4210-4211; A. 2527-2528). Powell testified that when Dowd informed him of the plan to give the participating officers salary increases if they agreed to contribute, Powell asked Dowd whether the program was legal (Tr. 4211; A. 2528). Dowd informed him that the program had been cleared by counsel (Tr. 4211; A. 2528).

Powell testified that in June, 1970, he learned of an article in the *Wall Street Journal* dealing with political contributions, that he subsequently located the article and sent a copy of it to Mr. DeGenaro with a notation that he would like to talk to him about it (Tr. 4234-4236). He testified that he later spoke with DeGenaro about the article and in the course of the conversation, DeGenaro suggested that it might be a good idea not to have an account within the Bank (Tr. 4237-4238). Powell passed this information on to Dowd, and the Long Island Public Affairs Club, which was then in existence, was terminated shortly thereafter (Tr. 4238-4239).

4. Testimony of George DeGenaro

DeGenaro was called as a witness by defendants Dowd and Powell.* He testified that he could not recall any conversation with Dowd in the fall of 1967 on the subject of political contributions, the purchase of dinner tickets or the like (Tr. 2886), but remembered such a conversation occurring at some time not later than March, 1968 (Tr. 2915). He testified that following legal research on 18 U.S.C. §610, he advised Dowd that (1) the Bank itself could not purchase tickets to political functions; (2) officers of the Bank could purchase such tickets voluntarily;

* When called to testify, DeGenaro invoked the attorney-client privilege (Tr. 2622-2623) on instructions from trial counsel for the Bank (Tr. 2632). The Bank's motion asserting the privilege (Tr. 2640; BA 46, 279-302) was denied by the trial court (Tr. 2723-2724; BA 87-88). Although the minutes of Mr. DeGenaro's Grand Jury testimony (Tr. 2659-2661; BA 65-67), as well as an examination of Mr. DeGenaro by the trial court (Tr. 2641-2662; BA 47-68), indicated that DeGenaro had never received a waiver of the privilege from the Bank, the court ruled that "since . . . a prima facie case of conspiracy to violate the election laws has been proven, the Court concludes that the communications in question were not privileged" (Tr. 2723-2724, BA 87-88). Following this ruling, the court also denied the Bank's motion for a severance (Tr. 2724, BA 88).

(3) there could be no reimbursement or compensation for tickets purchased by the officers; and (4) the Bank could purchase advertising in political journals provided it received fair advertising value (Tr. 2910-2917). He specifically denied that Dowd ever told him that the Bank planned to give salary increases to officers who participated in a contributions program (Tr. 3000).

DeGenaro denied having any conversation with Dowd or Dutra regarding the change from the Betty Jaeger account to the Long Island Public Affairs Club (Tr. 2879). He denied talking with Dowd about disbanding the Club in 1970, following his receipt of the *Wall Street Journal* article (Tr. 3002); he admitted talking with Powell following receipt of the article, but denied that he told Powell to disband the Club (Tr. 3002). He denied any conversation with Dowd in the year 1970 on the subject of having the individual officers make contributions on their own checking accounts (Tr. 3004).

5. Testimony of William Shea

William Shea testified* that he was aware in late 1967 that certain officers of the Bank began making contributions following the end of the Directors' program (Tr. 3110), but he had no recollection of any conversation with Mr. Clifford or George DeGenaro, his law partner, about the institution of the Betty Jaeger account at the Bank (Tr. 3047, 3107). He testified that he loaned $2,000 to the account in October, 1969 (Tr. 3047), to tide it over, and that this amount was repaid from the Jaeger account short-

* The court's ruling denying the Bank's motion, on the ground of attorney-client privilege, to prevent Mr. DeGenaro from testifying applied equally to Mr. Shea (Tr. 2686-2703, 2723-2724; BA 69-86, 87-88).

ly thereafter (Tr. 3048-3049). He testified that he subsequently loaned $15,000 to the Long Island Public Affairs Club account for the same purpose (Tr. 3049-3050). This loan was repaid by the participating officers in the Arthur Chadwick system on their individual accounts; Shea testified that he was never aware of the nature of the repayment checks until the Grand Jury investigation began in 1974 (Tr. 3052-3053).

Shea testified that he never heard of salary increases being granted to contributing officers until after the investigation began (Tr. 3072), and he stated in substance that he would never have given legal advice authorizing such raises (Tr. 3073-3074).

6. Testimony of Stephen Corriss, Roger Lew, John Coulson, Anthony Sisti, John McNierney, Robert Burke, Lawrence Stehl, John Hackett

In addition to DeGenaro and Shea, the individual defendants called eight former officers of the Bank. Seven of these officers testified that they participated in the Bank's contributions program (Tr. 2572, 3127, 3190, 3240-3241, 3250, 3648-3649, 4198; A. 1453, 1497, 1561, 1604-1605, 1614, 1983-1984), and all seven stated that their participation was voluntary (Tr. 2569-2570, 3127-3128, 3190, 3241, 3250, 3648, 4198; A. 1450-1451, 1497-1498, 1561, 1605, 1614, 1983). Six of the seven did not receive salary increases in connection with their agreement to contribute (Tr. 2570, 3128, 3200, 3252, 3649, 4198; A. 1451, 1498, 1571, 1616, 1984) and the seventh, who did receive a raise (Tr. 3245; A. 1609), testified that he failed to make contributions for a period of seven months, but was never asked to make up the amount in any way (Tr. 3242; A. 1606). The eighth officer

testified that he first agreed, but later declined, to participate in the program and thereafter was promoted and received a $5,000 raise (Tr. 3211; A. 1580).

D. The Government's Rebuttal Case

The Government called two witnesses in rebuttal, Joseph Dutra and Bertram Driscoll. Dutra testified that Clifford, Dowd and Powell decided how the funds contributed by the officers would be spent (Tr. 4461-4464; A. 2664-2667). He also testified that in March, 1970, he had a meeting with Clifford, Dowd and Powell (Tr. 4476; A. 2679). According to Dutra, the topic of discussion was that Bank counsel had stated that there were two problems with the existing system—compensation of the officers and maintenance of a bank account (Tr. 4477; A. 2680). Dutra testified that he recommended that a separate club be set up, with participation by Bank officers and customers, and that no raises be given (Tr. 4479; A. 2682). Dutra suggested the name of the club be, "The Long Island Public Affairs Club" (Tr. 4480; A. 2683).

Bertram Driscoll, in-house counsel at the Bank from 1967 to 1973 (Tr. 4559), testified that at the request of Joseph Stefan he prepared a memorandum on 18 U.S.C. §610 in September, 1972. He testified that at the time he prepared the memorandum, he was unaware of the officers' contributions program and unaware that salary increases had been granted to participating officers (Tr. 4565-4566).

ARGUMENT

POINT I

This appeal is barred by the Double Jeopardy Clause and should be dismissed.

A. Introduction

This case represents another chapter in the continuing effort by the United States to expand its right to appeal from adverse rulings in criminal cases. See, e.g., *United States* v. *Serfass*, 420 U.S. 377 (1975); *United States* v. *Jenkins*, 420 U.S. 358 (1975); *United States* v. *Wilson*, 420 U.S. 332 (1975). Towards that end, the Government in this case takes the unprecedented step of seeking to appeal* from a jury verdict of acquittal entered in favor of the Bank.

The Government does not and could not deny that jeopardy in the traditional sense attached in the trial below when the jury was sworn.** *Downum* v. *United States*, 372

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* It has long been firmly established that an appeal by the Government in a criminal case is permitted only when authorized by statute. *See, e.g., United States* v. *Wilson, supra,* at 336, citing *United States* v. *Sanges*, 144 U.S. 310 (1892). The governing statute in this case is the Criminal Appeals Act, 18 U.S.C. §3731, which states in relevant part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information as to any one or more counts except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

** To the extent that the Government's citation (GB at 24) of *Palko* v. *Connecticut*, 302 U.S. 319 (1937), is meant to suggest that the Bank continues to be in jeopardy despite its acquittal by a jury, the contention is unsupportable. *United States* v. *Jenkins*, 420 U.S. 358, 369 (1975).

U.S. 734 (1963). Nor does the Government challenge the undoubted force of the general rule that the Double Jeopardy Clause absolutely prohibits a Government appeal from a jury verdict of acquittal (GB at 24-25). *United States* v. *Jenkins, supra,* at 365; *Fong Foo* v. *United States,* 369 U.S. 141 (1962); *Green* v. *United States,* 355 U.S. 184, 188 (1957); *United States* v. *Ball,* 163 U.S. 662 (1896). Rather, the Government endeavors to avoid the door-closing effect of the protections embodied in the Double Jeopardy Clause by urging that this appeal is permissible because the Double Jeopardy Clause does not apply to corporate defendants such as the Bank.* The Government's unsupported contention in this regard, quite simply, is that a corporate defendant is not a "person" within the meaning of the Clause** because the only jeopardy faced by such a defendant is a fine (GB at 17). This contention is without merit, and, accordingly, this appeal should be dismissed.

B. The Case Law

The Government fails to cite a single case in support of its position that a corporation is not entitled to the protections of the Double Jeopardy Clause. Not even a dissenting opinion can be mustered to bolster the Government's tenuous position.† Indeed, numerous cases have

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* The Bank concedes that under *United States* v. *Wilson,* 420 U.S. 332 (1975), the restrictions imposed by §3731 are coextensive with those of the Constitution, that no question of statutory construction is present, and that resolution of the constitutional question will determine the propriety of this appeal.

** The Fifth Amendment Double Jeopardy Clause provides: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

† The principal, if not exclusive, "authority" relied upon by the Government appears to be a recent law review note entitled: *Double Jeopardy and Corporations,* 28 Stanford Law Review 805 (1976).

(footnote continued on next page)

held that the established rules of double jeopardy protection do apply to corporate defendants. See, e.g., *Fong Foo* v. *United States*, 369 U.S. 141 (1962); *United States* v. *Martin Linen Supply Co.*, 534 F.2d 585 (5th Cir. 1976); *United States* v. *Southern Railway Corp.*, 485 F.2d 309 (4th Cir. 1973); *United States* v. *Glidden Co.*, 78 F.2d 639 (6th Cir. 1935); *United States* v. *United States Gypsum Co.*, 404 F.Supp. 619 (D.C. D.C. 1975); *United States* v. *American Honda Motor Co.*, 289 F.Supp. 277 (S.D. Ohio 1968); *United States* v. *American Honda Motor Co.*, 273 F.Supp. 810 (N.D. Ill. 1967); *United States* v. *American Honda Motor Co.*, 271 F.Supp. 979 (N.D. Cal. 1967); *United States* v. *H. E. Koontz Creamery, Inc.*, 257 F.Supp. 295 (D.C. Md. 1966); *United States* v. *Armco Steel Corp.*, 252 F.Supp. 364 (S.D. Cal. 1966). See also *Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937). In addition, a number of courts have assumed such protection in considering on the merits double jeopardy claims raised by corporations. See, e.g., *Rex Trailer Co.* v. *United States*, 350 U.S. 148 (1956); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 787-789 (1946); *United States* v. *Martin Linen Supply Co.*, 485 F.2d 1143 (5th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); *United States* v. *Wilshire Oil Co.*, 427 F.2d 969 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970); *United States* v. *American Oil Co.*, 296 F.Supp. 538 (D.C. N.J.), *cert. denied*, 396 U.S. 845 (1969).*

The Supreme Court has held that a corporation is entitled to double jeopardy protection. In *Fong Foo* v. *United*

Even this commentary, however, recognizes that application of the Double Jeopardy Clause turns on the nature of the proceeding and not the species of relief sought. *Id.* at 809. *See also Breed* v. *Jones*, 421 U.S. 519, 528 (1975); *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873).

* At least one state court has held that a corporation is a "person" entitled to double jeopardy protection under the state's constitution. *City of Englewood* v. *Geo. M. Brewster & Son*, 77 N.J. Super. 248, 126 A.2d 120 (App. Div. 1962).

States, 369 U.S. 141 (1962), the First Circuit reversed the trial court's directed verdict of acquittal in the midst of trial, and ordered a new trial. The Supreme Court, in reversing the Circuit Court, stated that:

> "The Court of Appeals thought, not without reason, that the acquittal was based upon an egregiously erroneous foundation. Nevertheless, '[t]he verdict of acquittal was final, and could not be reviewed . . . without putting [the petitioners] twice in jeopardy, and thereby violating the Constitution.' *United States* v. *Ball*, 163 U.S. 662, 671." *Id.* at 143.

One of the three petitioners in *Fong Foo* was a corporation, and the Court's ruling applied equally to it and the individual petitioners. The Government's almost casual effort to downplay the authority of *Fong Foo* is disingenuous if not outright misleading. Standard Coil Products Co., Inc., the petitioner in *Fong Foo* which, to use the Government's words, "happened to be a corporation . . . benefiting from [the Court's] holding . . ." (GB at 21), filed its own petition for certiorari. The first question presented in its petition was "whether the double jeopardy clause of the Fifth Amendment of the Constitution of the United States bars a new trial of the defendant for the same alleged federal crime after a judgment of acquittal has been entered in the previous trial. . . ."* Moreover, counsel for Standard Coil, in their Brief submitted solely on behalf of the corporate petitioner, explicitly raised the precise issue pressed by the Government on this appeal. Their argument that a retrial was barred by the Double Jeopardy Clause expressly adverted to the question whether a corporation is a "person" within the meaning of the

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* Petition for a Writ of Certiorari at 2, *Standard Coil Products Co., Inc.* v. *United States* (decided with *Fong Foo* v. *United States*), 369 U.S. 141 (1962) (BA 303).

Double Jeopardy Clause, and cited authority for an affirmative response.* Had the Government, in these circumstances, simply acquiesced in Petitioner's reading of the Constitutional guarantee, could it be said that the question was not raised? Perhaps the Government would debate the matter. Yet, in *Fong Foo* the Government *conceded* the Constitutional question in its answering Brief when it stated: "It is true, of course, that petitioners have been in jeopardy." Brief for the United States at 46 (BA 334).

In short, there was no failure in *Fong Foo,* as the Government would have this Court believe, to raise, argue or consider the question presented here.** Indeed, the Court's holding as to the corporate petitioner was necessarily premised on the Court's acceptance of the petitioner's argument that a corporation is a "person" within the meaning of

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* "Petitioner corporation is a 'person' entitled to the Constitutional safeguard under the Fifth Amendment against being 'twice put in jeopardy.' *United States* v. *Ghidden Co.,* 78 F.2d 639 (6th Cir. 1935); *United States* v. *United States Industrial Alcohol Co.,* 15 F. Supp. 784 (D.C. Md. 1936), *rev'd on other grounds,* 103 F.2d 97 (4th Cir. 1939). *See also United States* v. *M'Hie,* 194 Fed. 894, 898 (N.D. Ill. 1912). This is the only reasonable construction of the double jeopardy provision of the Fifth Amendment since its rationale 'that the State with all its resources and power should not be allowed to make repeated attempts to convict', *Green* v. *United States,* 355 U.S. 184, 187 (1957), or to impose successive punitive sanctions, is as applicable to a corporation as to an individual." Brief for Standard Coil Products Co., Inc. at 52 n., *Standard Coil Products Co., Inc.* v. *United States* (decided with *Fong Foo* v. *United States*), 369 U.S. 141 (1962) (BA 310).

** This Court has not hesitated in the past to call attention to spurious arguments raised by the Government. Indeed, less than two months ago, this Court felt compelled to "charitably characterize . . . as disingenuous" a factual assertion by this United States Attorney's Office that a defendant had waived a claim to error. *United States* v. *Mariani,* Slip Op. 5045 at 5056 n.8 (2d Cir. July 19, 1976). By seriously misrepresenting the circumstances surrounding a dispositive holding of the Supreme Court, it is regretfully apparent that this same United States Attorney's Office has failed to heed this Court's earlier admonition.

the Double Jeopardy Clause. There was, at most, a failure by the Supreme Court to explain *why* it accepted a proposition raised by the petitioner which the Government itself apparently saw no reason to contest. This is no basis for ignoring, as the Government attempts here, a clear holding on the merits which disposes of the Government's contentions on this appeal.*

In an earlier case, *Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937), the Supreme Court held that a local antitrust law enacted by the government of Puerto Rico was not preempted by the Sherman Act. Given that the preemption doctrine embodies a strong policy against inconsistent multiple prosecutions by separate sovereigns, see, e.g., *Texas & Pacific Railway Co.* v. *Rigsby*, 241 U.S. 33, 41-42 (1916), the Supreme Court was careful to note that its decision upholding the local Puerto Rican statute would not have the effect of subjecting the respondents, individual or corporate, to multiple prosecutions under the Sherman Act and the local law for identical conduct, since the Double Jeopardy Clause would act as a bar.** In this context, the Court stated:

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* The Government's reliance on a footnote in *Stone* v. *Powell*, —— U.S. ——, 44 U.S.L.W. 5313, 5317 n.15 (1976) (GB at 21) for the proposition that *Fong Foo* is of no precedential value is frivolous. Mr. Justice Powell's view, expressed in the footnote, that the Supreme Court is not bound by an earlier decision on a question not raised in the petition for certiorari is of no relevance here. The simple fact of the matter is that the precise question at issue on this appeal was raised in the petition for certiorari in *Fong Foo*, and indeed was specifically argued by the corporate petitioner. Moreover, the Supreme Court has shown no inclination to disavow *Fong Foo*. The case is cited with approval in *United States* v. *Serfass*, 420 U.S. 377 at 392 (1975); in *United States* v. *Jenkins*, 420 U.S. 358 at 369 (1975), and in the concurring opinion of Douglas, J., and Brennan, J., at 370; and in *United States* v. *Wilson*, 420 U.S. 332 at 347 (1975) and in the dissenting opinion of Douglas, J., and Brennan, J., at 356.

** The impact of the Double Jeopardy Clause in the context of the preemption question was specifically raised in the petition for certiorari. Petition for a Writ of Certiorari at 30-31 (Point XIV), *Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937) (BA 347).

> "It is likewise clear that the legislative duplication gives rise to no danger of a second prosecution and conviction, or of double jeopardy for the same offense. The risk of double jeopardy does not exist. Both the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty. [citation omitted] Prosecution under one of the laws in the appropriate court, necessarily, will bar a prosecution under the other law in another court." *Id.* at 264.

Although the Court did not reach or decide the question whether a corporation, as distinct from an individual, is entitled to double jeopardy protection, the foregoing passage clearly assumes an affirmative response. A corporate defendant was before the Court, and an antitrust law was the subject of review. Moreover, the Court specifically analogized the situation before it to that presented in *Grafton* v. *United States,* 206 U.S. 333 (1907), which held that an individual's acquittal by a United States court martial barred a subsequent criminal prosecution for the same offense by the United States in a local court of the Philippines. Mr. Justice Sutherland, writing for the Court in *Puerto Rico* v. *Shell Co., supra,* stated that the two situations were the same "in all essentials." *Id.* at 265.

More recently, two Circuit Courts have held that the protections of the Double Jeopardy Clause are available to a corporation. The Fourth Circuit, citing *Fong Foo* v. *United States,* 369 U.S. 141 (1962) and *United States* v. *Armco Steel Corp.,* 252 F.Supp. 364 (S.D. Cal. 1966), noted without discussion that "the Double Jeopardy Clause . . . has been applied to corporations as well as natural persons." *United States* v. *Southern Railway Corp.,* 485 F. 2d 309, 312 (4th Cir. 1973).

The Fifth Circuit decision, *United States* v. *Martin Linen Supply Co.*, 534 F.2d 585 (5th Cir. 1976), involved a factual situation analogous to but less compelling than that presented here. In *Martin Linen*, an individual and two corporations were tried before a jury for contempt. The jury acquitted the individual but failed to reach a verdict as to the corporations. The trial judge thereupon declared a mistrial and subsequently granted the corporate defendants' timely Rule 29(c) motions for acquittal. The Government appealed.

The Circuit Court dismissed the appeal on the authority of *United States* v. *Jenkins*, 420 U.S. 358 (1975), as a retrial would be necessary.* The Court did not allude to the question whether the corporate defendants were eligible for double jeopardy protection in the first instance. Yet the case involved only corporate appellees and one central issue: the Government's right to appeal from a judgment of acquittal. Thus, while the question presented in the instant appeal was apparently not directly "raised" in *Martin Linen*, *supra*, it is difficult to imagine how it could have been more visible. Clearly, the court's view that a corporation is entitled to double jeopardy protection is the basis of the entire opinion.

Given the foregoing authorities, the Government's characterization of the relevant cases as "sparse" (GB at 21) reflects either wishful thinking or a paucity of re-

* In *Jenkins*, *supra*, the Supreme Court held that the Double Jeopardy Clause precludes a Government appeal from a verdict of acquittal when "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would . . . [be] required upon reversal and remand." 420 U.S. at 370.

search.* These authorities emphatically support the conclusion that a corporation is a "person" within the meaning of the Double Jeopardy Clause. While the Government minimizes the *stare decisis* value of the authorities disclosed by its research for their lack of reasoned holdings (GB at 23), the Supreme Court has disposed of similar contentions in the past in the context of the Double Jeopardy Clause. Thus, in *Gore* v. *United States*, 357 U.S. 386, 392 (1958), the Court responded as follows to petitioner's argument that the "same evidence" doctrine of *Blockburger* v. *United States*, 284 U.S. 299 (1932), should be re-examined:**

> "If there is any thing to this claim it surely has long been disregarded in decisions of this Court, participated in by judges especially sensitive to the application of the historic safeguard of double jeopardy. In applying a provision like that of double jeopardy, which is rooted in history and is not an evolving concept like that of due process, a long course of adjudication in this Court carries impressive authority."

C. Language, History and Policies of the Clause

The Government contends that the language, history and policies of the Double Jeopardy Clause provide persuasive support for its position that the Clause should not

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* Equally unsettling is the Government's failure to advise this Court that on July 27, 1976, the United States filed a petition for certiorari in *United States* v. *Martin Linen Supply Co.*, 524 F.2d 585 (5th Cir. 1976), Supreme Court Dkt. No. 76-120, in which the Court of Appeals implicitly resolved the broader constitutional issue presented here against the Government.

** Petitioner argued that reconsideration of *Blockburger* was merited because the Court had failed to particularize the complete legislative history of Federal narcotics laws. The Court dismissed the contention as "scant basis" for suggesting that the Court was unaware of this background. *Gore* v. *United States*, 357 U.S. 386 at 388. Surely the same could be said of the failure to articulate the contours of a central provision of the Fifth Amendment.

apply where the only jeopardy faced by a corporate defendant is a fine (GB at 17, 19). This contention is utterly without merit.

Although the Double Jeopardy Clause by its terms speaks of "jeopardy of life or limb," it is settled that the Clause means something far broader than its literal language. *Breed* v. *Jones*, 421 U.S. 519, 528 (1975). The Supreme Court has read the Clause as "written in terms of potential risk of *trial* and conviction, not punishment." *Price* v. *Georgia*, 398 U.S. 323, 329 (1970) (emphasis supplied). Thus, "in the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution." *Breed* v. *Jones*, *supra* at 528.

Contrary to the Government's suggestion (GB at 18), criminal prosecutions within the coverage of the Double Jeopardy Clause are clearly not limited to proceedings which may lead to a penalty of incarceration.* *United States* v. *LaFranca*, 282 U.S. 568 (1931); *United States* v. *Chouteau*, 102 U.S. 603, 611 (1880); *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 175-76 (1873). The test of whether the Clause applies is not the nature of the penalty which may be imposed, whether upon an individual or a corporation, but rather the character of the proceeding as remedial or criminal.** *Helvering* v. *Mitchell*, 303 U.S. 391, 398-99 (1938).

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* Indeed, it is interesting to note that Lord Coke traced the origin of double jeopardy to the Latin maxim *"facere finem de transgressione etc. cum rege,* to make an end or fine ['a pecuniary punishment'] with the king for such a transgression." J. Sigler, *Double Jeopardy: The Development of a Legal and Social Policy* 19 (1969).

** The Government's argument that the Double Jeopardy Clause should not apply to a corporation because it is only subject to a fine is not only inconsistent with every decision of the Court cited above, but is also logically flawed. The identical argument that the Govern-

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Thus, in actions which cannot lead to incarceration but only to economic sanctions, the Court has emphasized "the line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice." *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, 548-49 (1943). This prosecution of the Bank under 18 U.S.C. §610, which the Government describes as "a major criminal prosecution" (GB at 16), undoubtedly falls into the latter category and is within the scope of the Double Jeopardy Clause unless, as the Government urges, the Bank is not a protected "person."

Resolution of this question does not, as the Government suggests but fails to delineate, lie in the history of the Double Jeopardy Clause. That history, which has roots as early as Greek and Roman times, *Bartkus* v. *Illinois,* 359 U.S. 121, 151-52 (1959) (dissenting opinion of Black, J.), is of little assistance in determining whether it was intended to apply to corporations as well as natural persons. A corporation was apparently not indictable at common law. *New York Central & Hudson River Railway Company* v. *United States,* 212 U.S. 481, 492 (1909). Thus, the application of the Clause to the corporate defendant was most likely not in the contemplation of the drafters of the

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ment proffers here could be made with respect to the prosecution of individuals under numerous federal criminal statutes. *See, e.g.,* Title 18, United States Code, Sections 154, 243, 244, 288 (claims of less than $100), 291, 431, 432, 475, 489, 616, 1694, 1696(b), 1697 and 1698. Yet, the Government concedes, as it must, that an appeal would be barred by the Double Jeopardy Clause where an individual defendant has been tried and acquitted (GB at 16, 24-25). Thus, by the Government's own admission, it is clear that the nature of the potential penalty is not the sole determinant of the reach of the Double Jeopardy Clause.

Fifth Amendment. This fact does not, as the Government suggests (GB at 18), foreclose the inquiry but rather provides a starting point. As Mr. Justice Marshall stated in *Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 250, 307 (1819):

> "It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or would have been made a special exception. The case being within the words of the rule,[*] must be within its operation likewise, unless there be something in the literal construction, so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception. On what safe and intelligible ground can this exception stand?"

An analysis of the policies underlying the Double Jeopardy Clause establishes that there is no basis, much less a safe or intelligent one, for excluding a corporation from its protections.

One of the central purposes of the Clause is to protect a defendant against multiple prosecutions for the same

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* The Government's facile argument that a corporate prosecution is not within the words of the Clause because a corporation is not a "person" (GB at 18) is at odds with venerable authority. Blackstone defined persons as "divided by the law into either natural persons or artificial." 1 Blackstone, *Commentaries on the Laws of England* 95 (4th ed. 1876). In addition, the Supreme Court from its earliest decisions has broadly construed constitutional and statutory language to include a corporation whenever necessary to protect the interests of its shareholders. *See, e.g., Santa Clara County* v. *Southern Pacific Railroad Co.*, 118 U.S. 394, 396 (1886); *Society for the Propagation of the Gospel* v. *New Haven*, 21 U.S. (8 Wheat.) 206, 213 (1823); *Bank of the United States* v. *Deveaux*, 9 U.S. (5 Cranch) 37, 50 (1809). *See also Railroad Tax Cases*, 13 F. 722, 744 (9th Cir. 1882).

offense. *United States* v. *Wilson*, 420 U.S. 332, 343 (1975). This policy against multiple trials is so strong that exceptions to it have been only grudgingly allowed. *Id.* Hence the rule that the Government may not appeal an acquittal when appellate review might subject the defendant to a second trial, as is true in the present case. *United States* v. *Jenkins*, 420 U.S. 358, 365 (1975); *Fong Foo* v. *United States*, 369 U.S. 141 (1962); *Kepner* v. *United States*, 195 U.S. 100 (1904); *United States* v. *Ball*, 163 U.S. 662 (1896).

The rule against multiple trials furthers fundamental notions of fairness and finality. As Mr. Justice Black stated in *Green* v. *United States*, 355 U.S. 184, 187-188 (1957):

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

These policies apply fully to the corporate defendant. The risk of prosecutorial abuse, in the form of repeated attempts to obtain a conviction, is precisely the same whether the defendant is a natural or a legal person.* This function of the Clause as a restraint upon unwarranted governmental action does not derive its purpose from the character of the defendant, but reflects a need to "lessen the

* The Government does not appear to suggest that the risk of prosecutorial abuse is present to a lesser degree where the defendant is a corporation than where the defendant is a natural person. Indeed, given the Government's conduct in the trial below, it would be hard pressed to make such a suggestion. See discussion in note at p. 33 *infra*.

danger of governmental tyranny." J. Sigler, *Double Jeopardy: The Development of a Legal and Social Policy* 15 (1969). See also *Gori* v. *United States*, 367 U.S. 364, 372 (1961) (dissenting opinion of Douglas, J.); Note, "Double Jeopardy and the Multiple-Count Indictment," 57 Yale L. J. 132, 133 (1947). Hence the attachment of jeopardy when a jury is sworn, which "prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict." *Green* v. *United States*, 355 U.S. 184, 188 (1957). This important function of the Double Jeopardy Clause as a curb on prosecutorial abuse has continuing vitality in every prosecution, whether of an individual or a corporation.* *United States* v. *Kessler*, 44 U.S.L.W. 2543 (5th Cir. May 3, 1976).

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* From beginning to end, the trial below was marked by the kind of abuse that the Double Jeopardy Clause is designed to guard against. By way of illustration, but not limitation, we set forth below four instances which typify this type of abuse: Shortly before the Government rested its direct case, the prosecutor, over defense objection, caused to be received in evidence a large summary chart which purported to show the total amount of alleged political contributions made by the Bank. During the colloquy on admissibility, the prosecutor admitted that the chart was in error by some "ninety-odd thousand dollars" or approximately "one-third" the totals shown (Tr. 2371-2393, 2437; BA 18-40, GX 181). Although expressing serious doubt as to the chart's admissibility, the trial judge nevertheless allowed it to be received in evidence (Tr. 2386-2387, 2441; BA 33-34, 41). *See United States* v. *Altruda*, 224 F.2d 935 (2d Cir. 1955). In his summation, the prosecutor, notwithstanding his earlier concession that the chart was substantially in error, argued its accuracy to the jury (Tr. 4882-4883, 4926, 5018; BA 135-136, 179, 269). Even more objectionable was the prosecutor's attempt, during his cross-examination of one of the defendants, to place in evidence as a contemporaneous document an exhibit which he had manufactured. Indeed, it was only after repeated requests by the defense as to the origin of this exhibit that the prosecutor finally admitted that he had prepared it (Tr. 3975-3977, 4027-4028; A. 2304-2306; BA 89-90; GX 186 *id.*). *See United States* v. *Kessler*, *supra*. In his summation, the prosecutor's conduct went beyond mere abuse: On ten separate occasions, the Assistant United States Attorney used the words *lie*,

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A second policy underlying t[illegible]e against multiple prosecutions is that the possibility o[illegible] convicting an innocent defendant is thereby minimized. *Green* v. *United States*, 355 U.S. 184, 187-188 (1957). Clearly, this policy applies regardless of the character of the defendant. The wrongful conviction of an innocent corporation, following repeated

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lied or *lying* to characterize answers allegedly given by Mr. Clifford in response to certain questions put to him by a federal bank examiner (Tr. 4886, 4895, 4896, 4897, 4903, 4905, 4906, 4907, 4913; BA 135, 148, 149, 150, 156, 158, 159, 160, 166). While the use of such epithets to characterize Mr. Clifford's responses may not fall squarely within this Court's holding in *United States* v. *White*, 486 F.2d 204 (2d Cir.), *cert. denied*, 415 U.S. 980 (1974), since Mr. Clifford was charged with having made false statements, it was nevertheless grossly improper to use such inflammatory words with respect to Messrs. Dowd and Powell, who the Government conceded had made no statements whatsoever to the bank examiner (Tr. 4887, 4893, 4894, 4897; BA 140, 146, 147, 150). Yet, on not less than eight occasions, the Assistant United States Attorney told the jury, "*they* lied" (Tr. 4896, 4897, 4903, 4905, 4906, 4907, 4913; BA 149, 150, 156, 158, 159, 160, 166), and on another occasion went so far as to state: "*these three men* would be able to and did trade their credibility, traded their trustworthiness and traded their honor . . ." (Tr. 4895; BA 148). By far the most egregious instance of overreaching occurred when the Assistant United States Attorney, in referring to an article which had been received in evidence solely as to defendant Powell, stated in his summation: "Ask yourselves how any intelligent person reading this article could have come to any other conclusion in the world but that what was going on at the Security National Bank was illegal *and no less an authority than the Commissioner of the Internal Revenue Service said so*" (Tr. 4986; BA 237). The Commissioner of the Internal Revenue Service had not, of course, testified at the trial and the article made no mention of the Security National Bank (GX 162). Moreover, the article had been received in evidence over defense objection solely on the question of knowledge and not for the truth of its contents (Tr. 2062-2063, 3014-3018; BA 359-360, 361-365). So improper was this remark that the District Court opined: "I have a horrible feeling—I am not certain whether I am right or not—but I have a horrible feeling that it [the prosecutor's statement] borders fairly close, fairly close on the statement that shouldn't be made to a jury . . ." (Tr. 5014; BA 265). Indeed, the trial judge's comment on the Assistant United States Attorney's summation as a whole succinctly forecast the likely effect of the Government's pervasive overreaching in the trial below: "My impression of the summation—I will tell you one thing—it is going to cause some problems" (Tr. 5014; BA 265).

trials, would be no less reprehensible than the wrongful conviction of an individual defendant.*

The final set of considerations noted by Mr. Justice Black in *Green* v. *United States, supra,* concern the embarrassment, expense, ordeal, anxiety and insecurity which would be suffered by a defendant exposed to the potential of multiple prosecutions for the same offense. In its Brief, the Government makes much of its contention that these considerations apply only to the individual defendant (GB at 19-21). Implicit in this contention is a lack of appreciation for the day-to-day realities of life in a modern society.

Denial of double jeopardy protection to the corporation would lead to adverse effects closely akin to those enumerated in *Green.* Thus, for example, the expense of defending repeated prosecutions and appeals would burden a corporation just as surely as it would an individual. In the case of a small or closely held corporation, to deny that this expense, or the fines that might ultimately be imposed, is borne directly by individuals is to deny reality. And such costs are always borne indirectly by the shareholders. *United States* v. *Armco Steel Corp.,* 252 F.Supp. 364 (S.D. Cal. 1966); cf. *Railroad Tax Cases,* 13 F. 722, 746 (9th Cir. 1882). Similarly, a charge of criminal wrongdoing can be as embarrassing and economically damaging to a corporation as to an individual. Indeed, a corporation, like an individual charged with a crime, must be concerned not only with the verdict of "the jury but [with] the verdict of the community as well." *Price* v. *Georgia,* 398 U.S. 323 at 331 n.10 (1970).

* Nowhere in its brief does the Government suggest that the wrongful conviction of a corporation is not equally repugnant to our concept of justice.

The Government stresses that a corporation is incapable of suffering "the uniquely personal emotional trauma which an individual tried for a crime faces" (GB at 21). The courts have not been so myopic. In several cases, courts have dismissed indictments against corporations on due process and double jeopardy grounds, specifically finding that multiple prosecutions by the Government amounted to "harassment" of the corporate defendants. *United States* v. *United States Gypsum Co.*, 404 F.Supp. 619 (D.C. D.C. 1975); *United States* v. *American Honda Motor Co.*, 273 F.Supp. 810 (N.D. Ill. 1967); *United States* v. *American Honda Motor Co.*, 271 F.Supp. 979 (N.D. Cal. 1967). In the *Honda* cases, the courts stressed that multiple prosecutions require repeated responses to subpoenas and subpoenas *duces tecum* and that "this is precisely the sort of harassment which fundamental fairness and the due process clause prohibit." 273 F.Supp. at 820; see 271 F.Supp. at 988. In the Illinois *Honda* case, the court added that "the Government is not a ringmaster for whom individuals and corporations must jump through a hoop at their own expense each time it commands."* 273 F.Supp. at 820.

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* The Government's assurance that "we do not seek a second trial simply to harass or 'to do better a second time'" (GB at 24) notwithstanding, the quoted passage above more aptly characterizes the long history of this prosecution. The investigation in this matter commenced as early as the spring of 1974. During the course of this investigation the Bank's assets were sold and for all practical purposes, the Bank ceased to exist as a viable entity. Eight months after its demise, the Bank, along with three of its former officers, was indicted. In an effort to save the expense of what promised to be a long trial, the Bank offered to plead *nolo contendere* to the entire indictment (the Bank rejected an offer to plead guilty to two counts). The Government opposed the Bank's offer to plead on the grounds that it was contrary to Justice Department and public policy (Transcript of Proceedings, March 3, 1976 at 5-13, 23-25; BA 1-9, 10-12). (Curiously, the very next day this same United States Attorney's office consented to the entry of *nolo contendere* pleas by two corporate defendants charged with unlawfully transporting hazardous cargo in

(footnote continued on next page)

The Government's view that a corporation is a fictional entity impervious to harassment, unaffected by the uncertainties which attend the prospect of multiple prosecutions —and thus not a protected "person" within the meaning of the Double Jeopardy Clause—is at odds not only with reality but with the spirit of analogous constitutional holdings as well. Of the many constitutional protections which have been extended to corporations,* several are especially pertinent. Thus, a corporation, like an individual, has a right to a public trial. *United States* v. *American Radiator & Standard Sanitary Corp.*, 274 F.Supp. 790 (W.D. Pa. 1967). In addition, courts readily assume that a corpora-

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violation of Title 49, U.S.C. §1472(h). The violation resulted in a fatal aircraft accident (Tr. 9-12; BA 13-16). *United States* v. *Pan American World Airways, et al.*, 76 Cr. 144 (E.D.N.Y.)). Following rejection of its offer to plead, the Bank was subjected to a ten and a half week trial in which it prevailed absolutely before a jury. Given this background, the Government's disclaimer of an intention to harass this defendant must be viewed with suspicion. Moreover, the Government's remark that it "[does not] seek a second crack at the apple" is, perhaps unwittingly, literally true. Having rejected its first opportunity to obtain a conviction, and lost the second, the Government by this appeal seeks a third chance. Surely, this type of harassment is proscribed not only by the Double Jeopardy Clause, but by the Fifth Amendment Due Process Clause as well. *See, e.g.*, *United States* v. *United States Gypsum Co.*, 404 F.Supp. 619, 624 (D.C. D.C. 1975); *United States* v. *American Honda Motor Co.*, 273 F.Supp. 810, 819-820 (N.D. Ill. 1967); *United States* v. *American Honda Motor Co.*, 271 F.Supp. 979, 987-988 (N.D. Cal. 1967). *Cf. United States ex rel. Hetenyi* v. *Wilkins*, 348 F.2d 844, 849-853 (2d Cir. 1965), *cert. denied*, 383 U.S. 913 (1966).

* A corporation enjoys the First Amendment's protection of freedom of speech, *Southeastern Productions, Ltd.* v. *Conrad*, 420 U.S. 546 (1974); the Fourth Amendment's protection against unreasonable searches and seizures, *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920); the Fifth Amendment's protection against the deprivation of its property without due process, *County of Santa Clara* v. *Southern Pacific Railroad Co.*, 18 F. 385, 404 (9th Cir. 1883), *aff'd*, 118 U.S. 394 (1886); *Railroad Tax Cases*, 13 F. 722, 746-747 (9th Cir. 1882); and the Fifth Amendment's prohibition against public taking without just compensation, *United States* v. *Great Falls Manf. Co.*, 112 U.S. 645 (1884). A corporation is also a "person" within the meaning of the equal protection and due process clauses of the Fourteenth Amendment, at least insofar as property rights are concerned, *Smyth* v. *Ames*, 169 U.S. 466, 522 (1898).

tion, like an individual, is entitled to a speedy trial. *United States* v. *Globe Chemical Co.*, 311 F.Supp. 535, 541-542 (S.D. Ohio 1969); *United States* v. *Mark II Electronics of Louisiana, Inc.*, 283 F.Supp. 280 (E.D. La. 1968); *United States* v. *Research Foundation, Inc.*, 155 F.Supp. 650 (S.D.N.Y. 1957). See *United States* v. *Heckler*, 175 N.Y.L.J. No. 121 at 1 (June 23, 1976); *United States* v. *Seafarers International Union of North America*, 343 F.Supp. 779 (E.D.N.Y. 1972). Finally, notwithstanding the recent decision of the Supreme Court in *Muniz* v. *Hoffman*, 422 U.S. 454 (1975), it still appears to be the law that corporations, as well as individuals, are entitled to a jury trial when a serious offense is charged. *Id.* at 477. See also *United States* v. *R.L. Polk & Co.*, 438 F.2d 377 (6th Cir. 1971).* Treatment of a corporation as a "person" within the meaning of the Double Jeopardy Clause is entirely consistent with its rights to public trial, speedy trial, and jury trial. These guarantees all serve equally as protections against harassment and prejudice to the defendant, whether an individual or a corporation.

Thus, the basic policies underlying the Double Jeopardy Clause's rule against multiple trials—the prevention of prosecutorial abuse, the avoidance of wrongful convictions, and the protection against harassment and expense—apply as fully to the corporate defendant as to the individual. The Government's simplistic argument that a corporation is nevertheless not a "person" within the meaning of the clause relies principally upon language in *Muniz* v. *Hoff-*

* "We . . . reject the government's simplistic argument that since the rule of [*Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966)] was phrased in terms of imprisonment of individuals it has no applicability to corporations which cannot be imprisoned. Such an argument . . . ignores the fundamental principle that corporations enjoy the same rights as individuals to trial by jury. . . ." *United States* v. *R.L. Polk & Co.*, 438 F.2d 377 at 379 (6th Cir. 1971).

man, 422 U.S. 454 (1975) and the fact that a corporation does not have a Fifth Amendment privilege against self-incrimination. *United States* v. *White*, 322 U.S. 694 (1944). Both cases are inapposite.

The five to four holding in *Muniz*, that a $10,000 fine imposed upon a labor union in a criminal contempt proceeding is a "petty offense" to which the Sixth Amendment jury trial guarantee is inapplicable, pertains equally to individuals and corporations. It provides no basis for distinctive treatment of the two. "Under the Court's current formulation, *the penalty* is of controlling significance." *Id.* at 480 n.6 (dissenting opinion of Douglas, J.) (emphasis supplied). Moreover, the Court expressly declined to reach the argument proffered by the Government that would have distinguished between individuals and corporations—"that there is no constitutional right to a jury trial in any criminal contempt case where only a fine is imposed on a corporation or labor union." *Id.* at 477. The irrelevance of *Muniz* to the Government's position on this appeal is more basic, however. For it surely requires a logical leap of staggering proportions to infer from *Muniz* that since a corporation (or an individual) may be fined in a non-jury trial, it may also be repeatedly fined, or repeatedly prosecuted, or subjected to a series of appeals from acquittals —all for the same offense. *Muniz* simply does not bear on the Double Jeopardy question presented here.*

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* The Government's reliance on *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), a Sixth Amendment case involving the right to counsel, as bearing on the scope of the Double Jeopardy Clause, is similarly misplaced. As the Court observed in *Breed* v. *Jones*, 421 U.S. 519 at 528 n.10 (1975):

> "Distinctions which in other contexts have proved determinative of the constitutional rights of those charged with offenses against public order have not similarly confined the protection of the Double Jeopardy Clause. Compare *Robinson* v. *Neil*, 409 U.S. 505 (1973), with *Baldwin* v. *New York*, 399 U.S. 66 (1970), and *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972)."

Similarly, the rule that a corporation may not invoke the Fifth Amendment privilege against self-incrimination, *United States* v. *White,* 322 U.S. 694 (1944), in no way supports the conclusion that a corporation is not a "person" within the meaning of the Double Jeopardy Clause. The two provisions require separate analysis.

As the Supreme Court explained in *Hale* v. *Henkel,* 201 U.S. 43, 69-70 (1906):

> "The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. . . . The question *whether a corporation is a 'person' within the meaning of the Amendment really does not arise,* except perhaps where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employees." (emphasis supplied)

Thus, the rationale of the exclusion of the corporation from the self-incrimination clause rests not on the fact that it is a legal entity, as opposed to a natural person, but on the basis that it is a third party on whose behalf the privilege cannot be asserted derivatively. This is not the case under the Double Jeopardy Clause, which comes into play when the corporation is itself brought to trial. Moreover, inclusion of the corporation within the Clause creates none of the risks which would, by extension in reasoning, follow its inclusion in the privilege provision: "a privilege so extensive might be used to put a stop to the examination of every witness who was called to testify. . . ." *Hale* v. *Henkel,* 201 U.S. 43, 70 (1906). On the

contrary, as demonstrated above, double jeopardy protection for the corporate defendant furthers the very same policy considerations applicable to the individual defendant.

We conclude by observing that in filing this appeal from a jury verdict of acquittal, the Government seeks to establish a parity between the accuser and the accused which is fundamentally at odds with the most deeply ingrained principles of our criminal justice system. In effect, the Government's position would emasculate a corporation's right to trial and virtually compel even the most combative defendant to enter a plea of guilt. In short, what the Government seeks on this appeal is, in its predictable effect, a Constitutional sanction for a forced plea of guilt from the corporate defendant. This Court should not countenance such a result.

POINT II

The District Court properly instructed the jury on the elements of Section 610.

A. The Court Properly Instructed the Jury that It Was Necessary to Find that the Contributions Were Actually Made with Bank Funds.

In the course of its instruction to the jury, the court below charged, in part:

> "... the Government must prove to you beyond a reasonable doubt, as to each defendant named in each of the counts, the following five elements:
>
> * * *
>
> Second, that the contribution charged in the specific count was *actually made with bank funds.*
>
> * * *

The second element is that the contribution charged in each charge was actually made with bank funds. A contribution includes both direct and indirect payments. As to Counts 3 through 9, for instance, the Government alleges that the bank made the contributions indirectly by giving certain of its officers salary increases which would then be used to make contributions on behalf of the bank. The defendants claim that these were salary increases and not funds caused by the bank to be given as political contributions in violation of the statute.

* * *

[illegible] find beyond a reasonable doubt that the [illegible] expended here were in fact indirect contributions of bank funds and that the officers were merely conduits for the bank's money, whether the officers participated voluntarily or not is immaterial." (emphasis supplied) (Tr. 5332-5334; A. 2825-2827).

The Government contends that the italicized portion of the instruction above was erroneous in that the instruction precluded a finding of guilt where an indirect contribution was charged and proved (GB at 3, 15-16, 25-27). This contention is without merit for two reasons.

In the first place, the Government not only failed to object to this portion of the charge, but *specifically requested* the language now complained of. Thus, in its Requests to Charge,* the Government submitted proposed instructions which stated: "Second, *that bank money was used to make the political contribution* or expenditure of money in connection with an election" (emphasis supplied) (Government's Requests to Charge, Request No. 4; BA

* The Government's Requests to Charge were filed with the District Court long before, as the Government states in its brief, "Judge Costantino initially indicated his acceptance of the theory of the defendants" (GB at 11).

357); "If you find that the monies expended here were in fact indirect contributions *of bank funds,* rather than officers' personal funds, whether the officers participated voluntarily or not is immaterial" (emphasis supplied) (Government's Requests to Charge, Request No. 5; BA 358).

Moreover, in the colloquy during which defense and Government counsel debated the specific wording of the charge, the following transpired:

> "Mr. Ryan: I am on the five elements now, your Honor.
>
> The Court: Yes. I have it.* With respect to item number two, we request in the interest of clarification that it read the—that it read that the contribution charge in the specified count was actually made by the Bank.
>
> The Court: I see nothing wrong with that.
>
> Mr. Pattison:** *Rather than by the bank, using bank funds as a much more accurate phrase.*
>
> The Court: All right.
>
> Mr. Pattison: *Using bank funds.*
>
> The Court: With bank funds.
>
> Mr. Ryan: As to element number four, I think it would be more appropriate perhaps to read in terms of the statute, namely the defendant or defendants named in the specific count caused or consented to the making of the contribution by the bank.
>
> The Court: All right.
>
> We'll change that.
>
> Mr. Pattison: Making—
>
> The Court: Caused or consented to.

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* Although the transcript indicates that the Court was speaking at this point, we believe the words commencing "With respect" are those of Mr. Ryan.

** Mr. Pattison is an Assistant Chief of the Criminal Division in the Office of the United States Attorney for the Eastern District of New York.

Mr. Ryan: Caused or consented to the making of the contribution by the bank.

Mr. Pattison: *Using bank funds, your Honor. I think you have said it in number one and number two.*

The Court: Yes." (emphasis supplied) (Tr. 4775-4776; A. 2756-2757).

It is difficult to imagine a clearer example of waiver than this. And this waiver, of course, precludes the Government's claim of error on this appeal. *Johnson* v. *United States,* 318 U.S. 189, 200-201 (1943); *United States* v. *Malcolm,* 475 F.2d 420, 428 (9th Cir. 1973); *United States* v. *Indiviglio,* 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied,* 383 U.S. 907 (1966).

Apart from the fact that the Government has waived its right to object to the court's charge, the instruction that it was necessary to show that "the contribution . . . was actually made with Bank funds" was plainly correct.

It is settled that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten,* 414 U.S. 141, 146-147 (1973). Indeed, the Court has recently stressed that in reviewing jury instructions, it is necessary to view the charge itself as part of the whole *trial. United States* v. *Park,* 421 U.S. 658, 674-675 (1975).

The language to which the Government now objects, when viewed in this manner, was perfectly proper. Certainly the court was required to instruct the jury that it could not find the defendants guilty unless contributions by the Bank were proved. The court's instruction did not, however, as the Government suggests, require proof that Bank money passed directly—in the sense of physical pos-

session or title—from the Bank to the recipient. The court specifically charged that "a contribution includes both direct and indirect payments" (Tr. 5333; A. 2826). In addition, the court specifically instructed the jury on the Government's theory of the case, ". . . that the bank made the contributions indirectly by giving certain of its officers salary increases which would then be used to make contributions on behalf of the Bank" (Tr. 5333; A. 2826).* Moreover, the court's charge alluded to the Government's contention that the officers were "merely conduits for the bank's money" (Tr. 5334; A. 2827). In this context, the five words the Government now complains of—"actually made with Bank funds"—could not possibly have left the jury with an erroneous understanding of the law. Indeed, when these words are read in the context of the entire ten and one-half week trial, in which the Government's theory of indirect Bank contributions was made abundantly clear to the jury, it is frivolous for the Government to now contend that this single clause in the court's charge erroneously contributed to the verdict of acquittal.

B. The Court's Charge Concerning the Requirement of Intent to Influence an Election Was Proper.

The trial judge charged the jury, in part:

> "In order for a contribution to be made in connection with an election, it must be made for the purpose of influencing an election.
>
> * * *

---

* The Court also charged the defendants' theory that "they were salary increases and not funds caused by the bank to be given as political contributions in violation of the statute" (Tr. 5333; A. 2826). While the Government objected to an earlier version of the charge on the defendants' theory of the case (Tr. 4777-4779; A. 2758-2760), Mr. Pattison explicitly approved this wording, as well as that of the charge on the Government's theory of indirect contributions, quoted *supra* (Tr. 4779-4780; A. 2760-2761).

> You have heard evidence indication [sic] that the principal purpose of making the contribution here alleged was to ultimately aid the bank's business. But regardless of the motive to help the bank, if the contribution was made to a political committee with the knowledge that it was going to be used in an election campaign, then that contribution was made with the requisite intent to influence the particular election. And this is so even if the principal purpose of making the contribution was to help the bank, not to influence the election. *Post-election contributions can be made in connection with an election. To find such a contribution you must find either by direct or circumstantial evidence or by inference that there was an agreement or understanding prior to the election to do so, and that is after considering all the facts in evidence in the case.*" (emphasis supplied) (Tr. 5335-5336)

The Government contends that this charge was erroneous because it required the jury to find that the contributions were made with the intent to influence an election. The Government concedes that as to pre-election contributions, the charge "may not have been harmful" because intent could be inferred from knowledge that the money would be used in a campaign (GB at 28). The Government claims, however, that the italicized portion of the charge relating to the post-election contributions (Counts Four and Fourteen) was erroneous. This contention is without merit.

Section 591(e) of Title 18, United States Code, provides that "contribution" means "a gift . . . made for the purpose of influencing the nomination for election, or election, of any person to Federal office . . . ." This definition, by the terms of Section 591, applies *inter alia* to Section 610 "except as otherwise specifically provided."

Section 610, insofar as here relevant, bars contributions and expenditures by national banks in connection with any election. The definition of "contribution or expenditure" contained in Section 610 does not require that it be made for the purpose of influencing an election.

In effect, the court's charge requiring proof of a purpose to influence an election tracked the language of Section 591(e). This charge was correct if the definition of contribution contained in Section 591(e) applies in a prosecution brought under Section 610. Two cases have squarely held that the general definitions of contribution and expenditure contained in Section 591(e) do determine the meaning of these terms as they are used in Section 610. *Miller* v. *American Telephone & Telegraph Co.*, 507 F.2d 759, 764-765 (3d Cir. 1974); *Ash* v. *Cort*, 496 F.2d 416, 424-425 (3d Cir. 1974), *reversed on other grounds*, 422 U.S. 66 (1975). See also *United States* v. *Lewis Food Co.*, 366 F. 2d 710, 712 (9th Cir. 1966), where the court held that an expenditure is not within Section 610 unless it is for an activity which constitutes "active electioneering."

These decisions requiring a purpose to influence an election as an element of Section 610 are entirely consistent with the policies underlying Section 610. In *United States* v. *Auto Workers*, 352 U.S. 567, 589 (1957), the Court, after reviewing the legislative history of Section 610, stated that "[t]he evil at which Congress has struck in §313 [now §610] is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party." In the *Auto Workers* case, the Court suggested that a relevant inquiry in the Section 610 prosecution before it would be whether a broadcast "consti-

tute[d] active electioneering or simply state[d] the record of particular candidates on economic issues." *Id.* at 592. See also *Buckley* v. *Valeo,* 424 U.S. 1 at 76-82 (1976).

The Government argues that the definition of contribution found in Section 610 applies exclusively in a prosecution brought under that section, and that Section 591(e) has no bearing. Thus, the Government argues that Section 610's proscription of contributions to state elections would be meaningless if Section 610 were governed by Section 591(e), since the definition of contribution contained in the latter applies only to Federal elections.* A similar argument was rejected in *Ash* v. *Cort, supra,* where the Circuit Court concisely explained the interrelationship of Sections 591 and 610 thus:

> "We note also that §591 indicates the 'meaning' of expenditure while §610 only indicates certain matters 'included' in that term. We therefore read §610 as supplementing rather than replacing §591's definition." 496 F.2d at 424-425.

This is the only reasonable way to view the two sections. A number of terms which are used in Section 610's definition of contribution are defined in Section 591 in terms of Federal elections.** By the Government's theory that Section 610 governs exclusively in a prosecution involving a contribution to a state election, these terms would be left undefined in such a case. Clearly, Congress did

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* We note that Count Four, one of the post-election counts, alleged a contribution to a candidate for Congress. Thus, the challenged instruction was clearly proper as to this Count, which falls within the literal language of Section 591(e).

** Section 591(b) defines a "candidate" as "an individual who seeks nomination for election, or election, to Federal office . . . ." Section 591(i) defines "political party" as "any association, committee, or organization which nominates a candidate for election to any Federal office . . . ."

not intend that result. We submit, as the courts have held, that Section 610 supplements Section 591, but does not replace it, and that the latter's definition of contribution applies with appropriate substitution of "state" or "local" for the word "Federal." Accordingly, the court's charge that it was necessary for the Government to prove a purpose to influence an election was correct.*

Assuming *arguendo* that the court's charge was incorrect, the error was harmless as to Count Fourteen. At the close of the Government's case, counsel for the Bank moved to dismiss Count Fourteen, in which the Bank was charged as a principal, on grounds of improper venue. The evidence upon which the motion was based established that the alleged contribution charged in the count was made by checks which were delivered and deposited in the Southern District of New York, rather than the Eastern District (Tr. 2470). See *Burton* v. *United States,* 196 U.S. 283 (1905); *United States* v. *Chestnut,* 533 F.2d 40, 46-48 (2d Cir. 1976); *United States* v. *McMaster,* 343 F.2d 176, 181 (6th Cir.), *cert. denied,* 382 U.S. 818 (1965); *United States* v. *Lotsch,* 102 F.2d 35, 36 (2d Cir.), *cert. denied,* 307 U.S. 622 (1939). The Court, we believe erroneously, denied the motion without explanation (Tr. 2470).**

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* If, as we maintain, the charge was correct, it was more favorable to the Government than the evidence warranted. Indeed, since the Government conceded (Transcript of Proceedings, March 3, 1976 at 4A) that there was no evidence at all from which the jury could infer "an agreement or understanding to contribute prior to the election . . ." (Tr. 5336), the post-election counts should have been dismissed for insufficiency.

** See also "Memorandum of Security National Bank to Dismiss Count Sixteen of the Indictment" (March 16, 1976), an earlier motion by the Bank to dismiss another count of the indictment on the same grounds, which was also denied.

Conclusion

This appeal should be dismissed.

Dated: New York, New York
September 8, 1976

Respectfully submitted,

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#5431

Affidavit of Service by Mail

In re:

United States of America v Security National Bank

State of New York
County of New York, ss.:

Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age. That on SEP 8 - 1976, 197..., he served 2 copies of the within Brief in the above named matter on the following counsel by enclosing said 2 copies in a securely sealed postpaid wrapper addressed as follows:

U.S. Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201
(Attorney for Appellant)

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

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Harry Minott

Sworn to before me this 8th day of Sept. 1976

Jack A. Messina

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